2019-08-13

Gold Rivka 2 LLC v. Rodriguez

[*1]

Gold Rivka 2 LLC v Rodriguez
2019 NY Slip Op 51341(U) [64 Misc 3d 1228(A)]
Decided on August 13, 2019
Civil Court Of The City Of New York, Bronx County
Bacdayan, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on August 13, 2019

Civil Court of the City of New York, Bronx County

Gold Rivka 2 LLC, Petitioner,

against

Santiago Rodriguez, Ysabel Manzanillo, Respondents.

43271/2016

Todd Rothenberg, Esq.- for the Petitioner

Bronx Legal Services, by Angela DeVolld, Esq - for the Respondent

Karen May Bacdayan, J.

In addition to the papers considered in rendering the Court's June 17th order, the following papers were considered in rendering this decision and order:

Papers Numbered

Respondent's Supplemental Affirmation in Support and

annexed Exhibits (A - H) 1

Petitioner's Supplemental Affirmation in Support and

annexed Exhibits (1 - 11) 2

Respondent's Supplemental Reply Affirmation 3

After oral argument and upon the foregoing cited papers, the decision and order on this motion is as follows:

BACKGROUND, PROCEDURAL HISTORY, AND FACTS

Having already issued a decision granting Respondent summary judgment dismissing the Petition and on her claim against Petitioner for a willful overcharge, the only question remaining before the Court is the calculation and amount of the overcharge award. In order to answer that question, the Court must examine the prevailing case law on the issue in light of the recent amendments to the Rent Stabilization Law enacted by the state legislature in June 2019.

The Prior Decision

In July 2016, Gold Rivka 2 LLC ("Petitioner"), sued Santiago Rodriguez and Ysabel Manzanillo for nonpayment of rent. Ms. Manzanillo ("Respondent") is represented by Bronx Legal Services.[FN1] Respondent moved into the premises pursuant to a purportedly fair-market lease for $2,000.00 per month with Petitioner's predecessor-in-interest in November 2014. Petitioner acquired title to the building in June 2015. In 2016, when Respondent retained counsel, she discovered she was a rent-stabilized tenant and that she was being charged more than the legal regulated rent for the premises. She then began withholding her rent payments.

In February 2017, Respondent was granted leave to conduct discovery. Twenty-two months later, Petitioner moved to restore the proceeding to the Court's calendar for trial. In response,

Respondent cross-moved for summary judgment dismissing the Petition for Petitioner's failure to properly plead the rent stabilized regulatory status of the premises and on the basis that the rent demand served pursuant to RPAPL 711 (2) was defective. Respondent also moved for summary judgment on her defense and counterclaim that Petitioner willfully charged her, and she had paid, a rent in excess of the monthly legal regulated rent for the premises. Respondent sought to have the rent set pursuant to the "default formula," more fully described below, and requested treble damages be assessed. Respondent further sought relief under CPLR 3126 for Petitioner's willful disobedience of court-ordered discovery deadlines. Argument was heard on May 22, 2019.

On June 17, 2019, the Court partially decided Respondent's motion and dismissed the Petition on the basis that Petitioner *conceded* that the premises is rent stabilized and failed to plead it as such, and on the basis that Petitioner had *conceded* that the rent charged was more than the legal regulated rent, and, therefore, the rent demand was defective. The Court further held that Petitioner is liable to Respondent for an intentional overcharge, Petitioner having utterly failed to explicate any prejudice, rebut the presumption of willfulness, or to explain the significant increase in rent between 2006 and 2007 after two years of litigation. Petitioner was also precluded from submitting any additional evidence or documentation in support of its opposition to Respondent's proposed calculation of the overcharge. Preclusion was based on Petitioner's extensive delays in complying with discovery orders, and its stipulation on the record that all available documents had already been provided, and that Petitioner had no further information to offer to the Respondent or to the Court.

Changes in the Law

On June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") was signed into law. The new law effects sweeping changes in the law regarding overcharge claims and to the methodology for determining the base date rent upon which to calculate an overcharge award. The HSTPA applies to all pending proceedings, including this one. The altogether new language states, in relevant part:

> "The division of housing and community renewal, and the courts, in investigating complaints of overcharge and in determining legal regulated rents, *shall consider all available rent history which is reasonably necessary to make such determinations*, including but not limited to (i) *any rent registration or other records* filed with the state division of housing and community renewal, or any other state, municipal or federal agency, *regardless of the date to which the information on such registration refers* . . . . Nothing contained in this paragraph shall limit the examination of rent history relevant to a

> determination as to: (i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including, but not limited to, *whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable . . . .*"

(Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516 [h], as amended by L 2019, ch 36, part F, § 5 [June 2019] [emphasis added].)

CPLR 213-a was also amended by the HSTPA. As amended, it now provides that, "an overcharge claim may be filed at any time, and the calculation and determination of the legal [*2]rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges." (CPLR 213-a, as amended by L 2019, ch 36, part F, § 6 [June 2019] [emphasis added].)

Along with the statute of limitations, the portions of section 26-516 of the Rent Stabilization Law ("RSL") relevant to CPLR 213-a were amended by the HSTPA and now state:

> "[T]he legal regulated rent for purposes of determining an overcharge, *shall be the rent indicated in the most recent reliable annual registration statement* filed and served upon the tenant six or more years prior to the most recent registration statement . . . . [I]n investigating complaints of overcharge and in determining legal regulated rent, [a court] shall consider all available rent history which is reasonably necessary to make such determinations."

(Administrative Code § 26-516 [a], as amended by L 2019 ch 36, part F, § 5 [June 2019] [emphasis added].)

While the HSTPA does not in any way affect this Court's June 17, 2019 decision, it raises questions for the Court about the continued applicability of the default formula when determining the base date rent upon which to calculate an overcharge. Thus, the Court issued the decision as set forth above, but asked the parties to provide additional briefing on the discrete issue of how to now calculate the amount of the willful overcharge. The parties were further directed to provide the Court with specific, numerical calculations supported by their arguments. The proceeding was adjourned for oral argument limited to the narrow issue of law as set forth above.

SUPPLEMENTAL ARGUMENTS

The parties agree, both in their papers and at oral argument, that the last reliable rent registration is that from 2006 which states that the legal regulated rent at that time was $646.77. (Supplemental affirmation of Respondent's counsel at 3; supplemental affirmation of Petitioner's counsel at 5.) This registration immediately preceded the significant increase in the registered rent in 2007 which Petitioner has not attempted to explain. The unexplained increase portended the Petitioner's registration of the premises as permanently exempted from rent stabilization in 2010. The apartment has not been registered since it was improperly deregulated. (Respondent's supplemental exhibit G.) None of these facts are disputed in the submissions relied upon in the June 17, 2019 decision, nor is a dispute as to these facts raised in the supplemental papers.

The parties diverge, however, on the methodology for calculation of the overcharge. Citing to section 26-517 (e) of the Rent Stabilization Law ("RSL"), Respondent argues that the rent should be set at the last reliable registration amount of $646.77, and "frozen" at that amount until Petitioner files a proper registration reflecting this legal regulated rent. (*See also* Rent Stabilization Code [9 NYCRR] § 2528.4.) Petitioner argues, as it did before, that the legal regulated rent should be set at the last reliable registration amount of $646.77, *plus* Rent Guidelines Board Order increases for each of the registered and unregistered lease terms thereafter. Petitioner bases the amount of the Rent Guidelines Board Order ("RGBO") increases it should be allowed to take on the leases and the terms therein which were provided through discovery. (Supplemental affirmation of Petitioner's counsel at 5-22.) As before, Petitioner cites no legal authority for its position.

In reply, Respondent argues that the increases in the leases between 2006 and 2009 are not lawful, and that the leases provided by Petitioner are void as against public policy and cannot form the basis for allowing Petitioner to benefit from subsequent increases. (Supplemental [*3]affirmation in reply of Respondent's counsel at 9.) Respondent argues that, as of 2010 when Petitioner concededly unlawfully deregulated the premises and ceased filing annual rent registrations with the Division of Housing and Community Renewal ("DHCR"), no additional increases may be added. (Supplemental affirmation in reply of Respondent's counsel at 15.)

Respondent originally argued that, because of Petitioner's willful, fraudulent actions, the DHCR "default formula" should be employed to determine the base date rent upon which to calculate the overcharge award herein. For the following reasons, the Court subscribes to the calculation methodology now advocated by Respondent in her supplemental papers, and does not apply the

default formula. DISCUSSION

A Brief History of the DHCR Default Formula

In 1997, the legislature enacted the Rent Regulation Reform Act ("RRRA") which amended RSL § 26-516 and buttressed the former four-year statute of limitations applicable to overcharge claims contained in CPLR 213-a. Read together, and as interpreted by the courts, these provisions instructed that when analyzing overcharge claims courts could not look beyond four years to determine the base date rent. In other words, the four-year statute of limitations began to run as of the first alleged overcharge, and examination of the rent history prior to the four years preceding the interposition of the overcharge complaint was precluded. Initially, courts adhered strictly to this rule. For instance, in *Brinckerhoff v New York State Div. of Hous. & Community Renewal* (275 AD2d 622 [1st Dept 2000]), the Court held that the tenant's overcharge claim interposed in April 1989 was time-barred as the first overcharge occurred August 1985 *despite* allegations of fraud on the landlord's part which the Court also found to be time-barred. (*See also Silver v Lynch*, 283 AD2d 213 [1st Dept 2001] [reversing the lower court finding of overcharge because the base rent is the rent charged *exactly* 4 years prior to the *complaint*, not the registration *on file* four years prior to most recent registration]; *Pechock v New York State Div. of Hous. & Community Renewal*, 253 AD2d 655 [1st Dept 1998] [holding that consideration of rental history more than four years prior to the complaint was barred despite improper registration in the fourth year].)

Then, in 2005, after years of unforgiving determinations based on an exacting interpretation of the four-year rule, the case of *Thornton v Baron* (5 NY3d 175 [2005]), reached the Court of Appeals. The *Thornton* Court opined that, in some instances, the practical effect of the four-year limitation was to protect unscrupulous landlords. Having found that the landlord in that case had engaged in an elaborate illusory tenancy scheme to circumvent the rent stabilization laws which began with an unlawful lease eight years prior to the interposition of the overcharge claim, the Court declined to read the four-year limitation period in a way that would allow "a landlord whose fraud remains undetected for four years—however willful or egregious the violation— [to], simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases . . . . That surely was not the intention of the legislature when it enacted the RRRA. Its purpose was to alleviate the burden on honest landlords to retain rent records indefinitely not to immunize dishonest ones from compliance with the law." (*Id.* at 181 [internal citations omitted].) Thus, the *Thornton* Court held that an uncodified default formula used

by DHCR should be employed to [*4]calculate the base date rent in overcharge cases where no reliable rent records are available.[FN2] (*Id.*) Accordingly, the Court held that the base date rent was not the rent registered four years prior to the interposition of the overcharge claim, but rather was the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building eight years before, immediately prior to lease that created the illusory tenancy scheme, and well beyond the four-year look-back period established by the 1997 amendments. (*Id.* at 180.)

After *Thornton*, Courts were more receptive to challenges to the four-year rule. Use of the DHCR default formula became more widespread and application was no longer limited to factual scenarios involving illusory tenancy schemes. Five years after *Thornton*, in *Grimm v State of New York Div. of Hous. and Community Renewal*, (15 NY3d 358 [2010]), the Court confirmed that its holding in *Thornton* was not restricted to the narrow circumstances in that case and held, without specifically finding that use of the default formula was warranted, that the base rent may be challenged when it was demonstrated that "a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date." (*Id.* at 367.) Then in *Matter of Pehrson v Div. of Hous. & Community. Renewal of State of NY* (34 Misc 3d 1220[A], 2011 NY Slip Op 52487[U] [Sup Ct, NY County 2011]), the court fashioned a three-factor test, purportedly (but not obviously) derived from *Grimm*, which courts and DHCR subsequently applied to ascertain whether allegations of fraud require use of the default formula:

> "(1) The tenant alleges circumstances that indicate the landlord's violation of the RSL and RSC in addition to charging an illegal rent. (2) The evidence indicates a fraudulent scheme to remove the rental unit from rent regulation. (3) The rent registration history is inconsistent with the lease history."

(*See e.g. FAV 45 LLC v McBain*, 42 Misc 3d 1231[A], 2014 NY Slip Op 50292[U] [Civ Ct, NY County 2014].) Whether all factors were necessary to warrant application of the default formula, or whether any of them would satisfy the test, was not made clear.

In the years following *Grimm* and *Pehrson*, courts found fraud warranting use of the still uncodified DHCR default formula based on a broadening range of factors including missing vacancy lease riders, improper lease forms, and absent or inaccurate rent registrations. However, not all courts, even when fraud factors were satisfied, applied the default formula, choosing instead to freeze the rent at the last reliable rent registration. (*See e.g. Butterworth v 281 St Nichols Partners LLC*, 160 AD3d 434 [1st Dept 2018].) Other courts declined to use the default formula finding that under

varying factual scenarios "sufficient" indicia of fraud had not been established as to warrant application of the default formula. (*See e.g. Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]; *Trainer v New York State Div. of Hous. & Community Renewal*, 162 AD3d 461 [1st Dept 2018].) The eventual codification of the default formula as part of the 2014 amendments to the RSC did not help to simplify the analysis. Instead, the amendments expanded on *Thornton* and *Grimm* and provided *alternate* methods for determining the rent upon which to calculate an overcharge when the base date rent was not reliable.[FN3]

Altogether, this created a patchwork of decisions for attorneys and judges to construe.

Calculation of Overcharges Under the Housing Stability and Tenant Protection Act

With the passage of the HSTPA the default formula is relegated to an alternate means by which to determine "whether the legality of a rental amount charged or registered is reliable in light of all available evidence." (Administrative Code § 26-516 [h] [i], as amended by L 2019, ch 36, part F, § 5 [June 2019].) Calculation of overcharge awards is now greatly simplified, and more consistency might be expected from the courts. Use of the default formula is no longer necessary, or desirable.

The amendments to CPLR 213-a and RSL § 26-516, when read together, clarify and reinforce one another and the plain text of the amendments leave this Court with little or no room for interpretation. Moreover, in construing the amendments, "the spirit and purpose of the act and the objects to be accomplished must be considered." (*Meegan v Brown*, 16 NY3d 395, 403, [2011].) As stated in the committee report, the new law is intended to "[eliminate] the ability of an owner to escape punitive damages where the overcharges were willful." (NY Comm Report, 2019 New York Senate Bill S6458.)

Courts are now instructed to look back as far as necessary to find the most reliable rent registration upon which to base its determination regarding an overcharge claim. Now, an unexplained increase in rent alone is sufficient to render a rent unreliable, and "[t]he legal regulated rent for purposes of determining an overcharge, *shall* be the rent indicated in the most recent *reliable* annual registration statement filed and served upon the tenant six *or more* years prior to the most recent registration statement." (Administrative Code § 26-516 [a], as amended by L 2019, ch 36, part F, § 4 [June 2019].) As the parties concede that the most recent reliable annual registration is that from 2006, the law requires the Court to find that $646.77 is the base rent for the purposes of

determining the overcharge herein. (*Id.*)

Petitioner's argument that RGBO increases should be added to the last reliable registered rent of $646.77 founders on the plain language of the HSTPA and controlling case law. In calculating the rent for determining a rent overcharge, the HSTPA allows for the addition only of "subsequent *lawful* increases and adjustments" to the amount of the most recent reliable annual registration statement. (*Id.* [emphasis added].)[FN4]

Section 26-517 of the RSL, which governs registration of rent stabilized apartments states, "[t]he failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement." (Administrative Code § 26-517 [e]; *see also* RSC [9 NYCRR] § 2528.4 [a] ["The late filing of a registration shall result in the elimination, prospectively, of such penalty, [*5]provided that the increases in the legal regulated rent were lawful except for the failure to file a timely registration"]; *215 W. 88th St. Holdings, LLC v NY State Div. of Hous. and Community Renewal*, 43 AD3d 652 [1st Dept 2016] [finding that a landlord may not retroactively claim increases to the rent upon filing missing or late registrations where the rent was unlawful for reasons beyond the failure to file a proper registration].)

After the last most reliable registration in 2006, Petitioner concededly entered into numerous unlawful leases and registered only two. These leases and registrations cannot serve as the basis for the addition of subsequent lawful increases. The 2007 lease, a two-year lease, which contained the unexplained increase from $646.77 to $1,480, is clearly a nullity because this lease contained an increase that was not lawful within the meaning of the RSL. A lease which attempts to evade the RSL, and contains an illegal rent, is void at its inception, and the rent registration statement listing this illegal rent is also a nullity. (*See Thornton*, 5 NY3d at 181.)

In addition to the incorrect rent increase in the 2009 lease, the rent amount in the 2009 registration is inconsistent with that lease, and likewise cannot serve as the basis for the addition of subsequent lawful increases. (*See Jazilek v Abart Holdings LLC*, 72 AD3d 529 [1st Dept 2010] [holding that an owner's false registration listing improper lease amounts barred the lower court from applying periodic rent increases in determining the amount of rent overcharge]; *Enriquez v NY State Div. of Hous. & Community Renewal*, 166 AD3d 404, 404 [1st Dept 2018] [defining a "proper" rent registration statement as one that "record[s] the actual amount of rent charged to the tenant" and is "not the product of fraudulent leases or otherwise" a "legal 'nullit[y]'"]; *see also John Manning*

Irrevocable Trust v Biggart, 2019 NY Slip Op 31256[U] [Sup Ct, NY County 2019].)[FN5]

Upon permanently exempting the apartment from rent stabilization in 2010, and ceasing to register the apartment altogether, Petitioner is plainly prohibited from collecting any increases. (Administrative Code § 26-517 [e]; RSC [9 NYCRR] § 2528.4 [a]; *215 W. 88th St. Holdings, LLC*, 143 AD3d 652; *Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434 [1st Dept 2018].) Accordingly, because no subsequent lawful increases are warranted given that the increase taken in the 2007 lease represented an unlawful attempt to circumvent the RSL, the registration of the 2009 lease is inconsistent with that lease, and no registrations exist after the unlawful exemption of the apartment, the rent is frozen at $646.77 until Petitioner offers Respondent a lease and properly registers the premises.

Petitioner's argument on the record that had it not taken illegal increases it could have taken the legal increases provided for by the RGBO, is not sound or based in law. A landlord who initially seeks to evade the rent stabilization laws should not benefit from what would have [*6]been lawful increases once it admits to wrongdoing, and, as here, is found liable for a willful overcharge. This was true under the old law and continues to be true. Other recent amendments to the RSL reinforce this public policy of deterring landlords from attempting to evade the law, and penalizing those who do. For example, the "safe harbor" provision which allowed landlords to avoid a finding of willfulness by immediately reimbursing a tenant for all overcharges has been eliminated. The statute now reads: "After a complaint of rent overcharge has been filed and served on an owner, the voluntary adjustment of the rent and/or the voluntary tender of a refund of rent overcharges shall not be considered by the Division of Housing and Community Renewal or a court of competent jurisdiction as evidence that the overcharge was not willful." (Administrative Code § 26-516 [a], as amended by L 2019, ch 36, part F, § 4 [June 2019] [emphasis added].) [FN6]

Indeed, calculating subsequent increases under the present circumstances has been held to be contrary to law. As the Court stated in *215 W. 88th St. Holdings LLC*, referring to a fact-pattern where the base date rent was set by the default formula, but which is equally applicable to a base date rent set under the HSTPA:

> "The practice of imposing a 'rent freeze' . . . based on the . . . base rent, without adjustments, throughout the relevant period—is not a matter merely of customary practice that the agency may deviate from when equitable considerations so demand. Rather, it reflects a statutory requirement. RSC § 2528.4 provides that an owner who filed an improper rent registration is barred from collecting rent in excess of the base date rent, and

> is retroactively relieved of that penalty upon filing a proper registration only when 'increases in the legal regulated rent were lawful except for the failure to file a timely registration.' That clearly is not the case here . . . . Thus, notwithstanding the arguably harsh result here, the agency did not have the discretion to add RGBO increases."

(143 AD3d at 653; *see also Hargrove v Division of Hous. & Community Renewal*, 244 AD2d 241 [1st Dept 1997].)

The Overcharge Award

The rent ledger provided and relied upon by Petitioner for its suggested calculations begins with an opening balance in May 2015 of "0.00." The next entry is dated June 1, 2015 and reflects a charge for the unlawful monthly rent of $2,000. The very next entry, also dated June 1, 2015 reflects an unexplained lump sum charge of $4,000 characterized as a "Balance FWD." (Petitioner's exhibit 13.) In its supplemental papers, Petitioner does not admit that this money was paid, but neither does Petitioner state unequivocally that it was not. Petitioner states that "assuming arguendo [that] Respondent paid in (sic) $2,000.00/month from November 2014 through May 2015," then "Respondent paid a total of $45,100.00" between November 2014, the commencement of her tenancy, and October 2016, when she began withholding her rent upon [*7]interposition of the overcharge claim. (Petitioner's supplemental affirmation in opposition at 26.) In fact, the breakdown reflects another zero balance opening December 2015, which indicates the carryover balance was satisfied.

Accordingly, the Court awards Respondent $90,672.87 as follows:

Since Respondent took possession of the premises in November 2014, and prior to her withholding her rent as of October 2016, $14,875.71 in rent accrued at what has been determined to be the legal regulated monthly rent of $646.77 (November 2014 — September 2016 = 23 months at $646.77 per month = $14,875.71). During this same time-period, $45,100 was paid. (Petitioner's exhibit 13.) This amount was not paid in every month; on several occasions Respondent paid nothing in one month but paid additional rent in subsequent months. Using Petitioner's own accounting practices, as evidenced by its rent breakdown and the predicate rent demand served in the now-dismissed Petition, Petitioner applied these payments first to rent arrears and then to current rent. Thus, in the months where rent was applied to arrears, an overcharge occurred when Petitioner used

the late payments to satisfy the unlawful rent charged for prior months.

The Court finds that the actual overcharge is $30,223.79 ($45,100 - $14,875.71 = $30,224.29). Trebling this amount because the overcharge is willful results in an award to Respondent of $ 90,672.87.[FN7] The Court does not credit Respondent's argument that interest must be assessed based on the amendment to the new law. (*See* Administrative Code § 26-516 [a] [4], as amended by L 2019, ch 36, part F, § 4 [June 2019].) The substitution of the word "shall" for "may" in this section simply brought that provision in line with other provisions which provide that where willfulness is not found, the penalty is the actual overcharge plus interest. On the other hand, where the overcharge is found to be willful, treble damages will be assessed. Here the overcharge is willful and Respondent is awarded treble damages. No calculation of interest upon this award is required by law or warranted. (*Mohassel v Fenwick*, 5 NY3d 44 [2005].)

CONCLUSION

Accordingly, the Clerk of the Court is directed to enter a money judgment in favor of [*8]Respondent and against Petitioner in the sum of $90,672.87 on her rent overcharge counterclaim.

This constitutes the Decision and Order of this Court.

Dated: August 13, 2019

Bronx, New York

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HON. KAREN MAY BACDAYAN

Judge, Housing Part

Footnotes

Footnote 1: Hereinafter, Ms. Manzanillo is the only Respondent to which this decision refers.

Footnote 2: At the time, section 2522.6 (b) of the Rent Stabilization Code ("RSC"), by its plain

terms, applied only to judicial sales, bankruptcy proceedings and mortgage foreclosure actions.

Footnote 3: The codified default formula, arguably inconsistent with *Thornton* and *Grimm*, provided that the rent shall be established at the lowest of the following: "(i) the lowest rent registered pursuant to section 2528.3 of this Title for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or (ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Title; or (iii) the last registered rent paid by the prior tenant (if within the four year period of review); or (iv) if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations." (RSC [9 NYCRR] § 2522.6 [b] [3].)

Footnote 4: Although much of the language regarding overcharge claims was amended by the HSTPA, the language allowing for the addition of subsequent lawful increases was not changed. (*See* Administrative Code § 26-516 [former [a]], as added by L 1985, ch 907, § 1.) Accordingly, the cases interpreting when such increases should be calculated — and when they should not be — remain relevant.

Footnote 5: Only the 2007 lease containing the significant jump in rent was properly registered with DHCR in that the registration reflected the actual amount charged. However, because that lease charged an unlawful amount of rent, it cannot now serve as the basis for an increase. Although the 2009 lease was registered in 2009, the registration does not contain a tenant's name, nor does it accurately reflect the monthly rent of the lease actually in effect at the time. The Petitioner registered a legal regulated rent of $1,546 per month, but the provided lease is for a purported preferential rent of $1,575 and a legal regulated rent of $1794.05. (Respondent's supplemental exhibit G; Petitioner supplemental exhibit 3.)

Footnote 6: In this case, not only did Petitioner not voluntarily offer a refund of overcharges, it moved in February 2017 to amend the pleadings to reflect the subject apartment as rent stabilized and then *withdrew* that motion "renewing its claim that the apartment is deregulated." (*Gold Rivka 2 LLC v Rodriguez*, Civ Ct, Bronx County, Feb. 22, 2017, J. McClanahan, index no. 43271/2016.) Not until the imposition of Respondent's current motion did Petitioner admit the rent stabilized status of the premises.

Footnote 7: Petitioner has disregarded the Court's admonition not to raise additional arguments in the requested supplemental briefing. Petitioner had previously argued that if the Court subtracted the rent paid over the course of the tenancy from the rent that had come due using what has now been found to the be the legal regulated rent, then in fact it is Respondent who owes Petitioner money, and, consequently, there is no basis for a finding of overcharge, or for the assessment of treble damages. Petitioner improperly attempts to reargue the Court's finding that there is no basis in law for Respondent to be penalized for withholding her rent once the overcharge was discovered and was being litigated. Petitioner previously cited no authority for this proposition. Now, without

explanation for why it was not raised before, Petitioner cites to one case, *Curry v Battistotti* (12 Misc 3d 129[A], 2006 NY Slip Op 51030[U] [App Term, 1st Dept 2006]), which affirmed a lower court decision in which the court calculated the rent in the manner Petitioner suggests. (*See Curry v Battistotti*, 5 Misc 3d 1012[A], 2004 NY Slip Op 51355[U] [Civ Ct, NY County 2004].) However, that was not the subject of the appeal or the affirmance. (*Compare Roker Realty Corp. v Gross* (163 Misc 2d 766 [App Term, 1st Dept 1995]) [tenants withheld their rent when they discovered that they were being overcharged, and the court calculated the overcharge based on the rent collected each month before the tenant began withholding her rent; *Johnson v Block* (65 Misc 2d 634 [App Term, 1st Dept 1971] [the lower court was upheld where treble damages were awarded on the basis that the landlord induced the tenant, who had begun withholding his rent upon discovery an overcharge, to continue to pay the overcharge amount during litigation].)

Return to Decision List